No. 12,363

IN THE

United States Court of Appeals

For the Ninth Circuit

YOUNG BROTHERS, LIMITED, Claimant of the Tug "Kolo", her boats, engines, machinery, tackle, etc.,

Appellant,

vs.

JOHN CHO,

Appellee.

Appeal from the United States District Court for the Territory of Hawaii.

REPLY BRIEF FOR APPELLANT.

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ARGUMENT.

1. **A LIBELANT IN REM MAY NOT BE MAINTAINED IN ADMIRALTY AGAINST A TUG ON A CAUSE OF ACTION SOUNDING IN TORT ARISING OUT OF A TOWAGE AGREEMENT ENTERED INTO BY THE MASTER OF THE TUG WITHOUT THE AUTHORITY OF THE OWNER OF THE TUG, WHICH LACK OF AUTHORITY WAS KNOWN, OR SHOULD HAVE BEEN KNOWN, BY THE LIBELANT, OWNER OF THE TOW.**

It is the position of the appellee that a vessel is liable *in rem* for maritime torts of negligent towage irrespective of the authority of the crew of the tug to engage in a towage operation (Brief of Appellee,

pp. 25-32). The appellee bases this conclusion upon the general admiralty principle, conceded by the appellant, that *in rem* liability normally attaches for torts committed by a vessel. Appellee's attempt to apply this doctrine to a towage case where the towee knew or should have known of the lack of authority of the tug master to undertake the tow is supported neither by admiralty cases, authors on the subject, nor by any other authority. The tug cases cited by him do not deal with the problem and furnish no basis for the extension of the application of the animistic doctrine[1] of *in rem* liability to cases where the towee voluntarily enters into a towage relationship knowing or reasonably put on notice of the lack of authority in the tug master to undertake the tow. *The Bulley*[2] involved tugs but no towage and the *John G. Stevens*[3] involved a collision of a tow but raised no question of the tug master's authority to enter into the towage relationship. The principle of *The Syracuse*[4] that a tug is liable for negligence even though the towage contract is at the tow's risk and the ruling of *The Temple Emery*[5] that a tug is liable for its negligence even though there is no towage contract does not

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[1]Errata in the opening brief of the appellant appear in footnotes 4 and 5 on page 20, the proper citations being:

4. Primitive Notions in Modern Law, 10 Am. L. Rev. 422. 432, et seq., The Common Law, 26-30.
5. Judge Harrington Putnam, 17 Am. L. Rev. 1, "The Liability of Shipowners for Masters' Faults".

[2]138 Fed. 170.
[3]170 U. S. 113.
[4]12 Wall. (79 U. S.) 167.
[5]122 Fed. 180.

deal with the basic problem or furnish any criteria for its solution.

The question is not whether there was or was not a towage contract but rather whether a tug is liable for the torts of its master arising out of a towage relationship where the towee voluntarily entered into the relationship knowing or put on notice that the tug master had no authority so to do.

The other citations of the appellee are similarly not in point. In *Rice v. The Marion A. C. Meseck*[6] a tug was held liable when its master following the directions of a harbor master standing on the tow caused the tow to be docked in a negligent fashion. No question of the authority of the master was raised.

King v. Red Star Towing & Transportation Co.[7] is cited by appellee for the proposition that a vessel taken in tow without charge can nevertheless hold the tug for its master's negligence. This principle is not the holding of the case but only *dicta* therein, and neither the case nor this excerpt establishes that a vessel is liable for its negligent towage irrespective of the authority of the crew to engage in the towage operation.

The appellee contends that the cases of *R. F. Cahill,*[8] *The Andrew J. White,*[9] and *The Oceanica*[10] re-

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[6]148 F. (2d) 522.
[7]48 F. (2d) 633.
[8]Fed. Cas. No. 11,735.
[9]108 Fed. 685.
[10]170 Fed. 893.

lied upon by the appellant are contrary to "the great weight of the American admiralty authority".[11]

No cases are cited by the appellee however which have reversed or even criticised these decisions. On the contrary, the three cited cases are obviously the only American decisions on the problem and constitute the American admiralty authority on this point.

Assuming the statement of the appellee that "the Federal Maritime Lien Act instead of limiting maritime liens, greatly increased the number of occasions when they would arise * * *"[12] to be a correct statement, nevertheless this act limited liens *in rem* in favor of a ship supplier so that if the supplier knew or by reasonable diligence could have ascertained that the person ordering the supplies, purportedly on behalf of the ship, was without authority so to do, then no lien could arise.[13]

The appellee's statement that the appellant's view would "clearly require an existing, valid towage contract as a prerequisite to recovery for towage * * *"[14] is not quite accurate. The position of the appellant is that if the owner of the tow knows the master of the tug has no authority to undertake the tow, the tug cannot be liable if the tow is nevertheless undertaken. If the knowledge of this lack of authority can be imputed to the tow owner, there can be no liability on the part of the tug. But if there is authority on the

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[11]Brief of Appellee, p. 31.
[12]Brief of Appellee, p. 32.
[13]46 U.S.C., Sec. 973.
[14]Brief of Appellee, p. 34.

part of the tug master or even if there is no such authority but the owner of the tow is ignorant of that fact, then the tug may be liable for its negligence in undertaking the tow, irrespective as to whether there was or was not a towage contract.

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2. **THE CUTTING OF A TOW LINE BY A TUG MASTER DOES NOT CONSTITUTE NEGLIGENCE AS A MATTER OF LAW, UNDER CIRCUMSTANCES WHERE THE TOWED VESSEL IS RAPIDLY SINKING, APPEARS TO BE ON THE VERGE OF COMPLETELY SUBMERGING, WHERE ONLY ITS BOW PROJECTS ABOVE THE WATER, AND WHERE THE QUESTION AS TO WHETHER IT WILL SINK DEPENDS UPON THE AMOUNT OF BUOYANCY IN ITS WOODEN STRUCTURE, THE SAFETY OF THE CREWMEN OF THE TOW AND THE TUG WOULD BE JEOPARDIZED BY A SUDDEN FOUNDERING OF THE TOW, AND WHERE THE NEAREST POINT OF LAND IS SOME EIGHT TO TEN MILES AWAY.**

It is the position of the appellee (Br. p. 10) that the standards of reviewability of findings of fact in admiralty are similar to those established in the Federal Rules of Civil Procedure for the review of findings of a Court without a jury. This is not an accurate statement as is evident by the language used by this Court in *Blake v. W. R. Chamberlin & Co.*, 176 F. (2d) 511, 512 (1949):

> "The devolution of law through judicial decision has greatly lessened the difference upon appeal between the ordinary action and tort and the de novo idea in admiralty cases for compensation. In tort cases, in the absence of reversible error, the judgment will be affirmed if it is supported by substantial evidence and the reviewing court

> cannot say that, viewing the whole case, an injustice has been done. United States v. United States Gypsum Co., 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746. In admiralty strong effect will be accorded the conclusion of the court from substantial evidence given by witnesses in court and weight will be accorded the Court's conclusion where part of the evidence is by witnesses in court and part by depositions. * * *"

It is submitted that this constitutes the proper rule for the review of the instant case.

Having adopted an inaccurate criterion of reviewability, the appellee then goes on and attempts to establish that the findings of the trial Court are supported by evidence and, therefore, are not "clearly erroneous".

Among the findings so contended by the appellee to be supported by evidence is Finding No. 7, Appellee's Brief p. 11). This contention is erroneous. That finding[15] states that, due to his inexperience, the tug master cut the line despite the advice of an experienced crewman that the tow would not sink and that the tow line should not be cut. This is not the substance of the testimony of the crewman as appears from the record.[16].

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[15]R. 26, Finding No. (7).

[16]The testimony of the crewman is:

"A. * * * I told Joe (tug master) more better not cut, it afloat yet * * *

Q. Why did you tell Joe not to cut the line?

A. I tell him more better no cut; she no sink, I think; it floating, the boat." (R. 149-150.)

The witness failed to qualify as an expert.

It is also said that this finding is supported by the testimony of Carl Holm that if he were as inexperienced "he might have done the same thing (R. 334), but knowing what he did, he would not have cut the line" (Appellee's Brief, p. 12). This is also an inaccurate summary of his testimony he also stating that he would have towed until he was absolutely sure she would submerge (R. 332).

The finding of the court that the sampan had sufficient buoyancy to remain afloat and could have been towed to Honolulu (Finding No. 8, R. 27) is said to be supported by the evidence of overhaul and periodic repairs, the evidence that sampan wood four years old would remain positively buoyant,[17] the testimony of experts that they knew of no instances where

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[17]The subsequent testimony of the expert Carl Holm with respect to the buoyancy of the sampan with the four year wood in its structure was apparently overlooked by the Court although the Court significantly enough felt this expert extremely well qualified, stating that "the Captain has given us the best insight into this problem that we have had. He certainly is an expert in his field, whereas the other man may be an expert, but I don't think he is quite as much of an expert as this man is." (R. 335.)

Holms' testimony on the buoyancy of the sampan is as follows:

"Q. Assuming that this sampan, which had no cargo, fuel tanks half full, and the other characteristics as given to you by Mr. Collins, assuming further that it had a crushed part three inches wide and a foot and a half long, but that that was pulling apart of the grain and opening of seams, rather than a hole, as expressively put by my brother, Mr. Collins, would you say that that sampan would sink?

A. I would say that from what I can see of the specifications of the ship, in regard to length and breadth and depth, and the weight factors in general involved in that type of sampan, that the buoyancy factor of the wood and the weight factor involved would lie very close together. It might be ten per cent in favor either way." (R. 324.)

Hawaiian sampans were lost through sinking,[18] testimony by one expert that such vessels do not normally sink;[19] testimony of another sampan owner of his vessel being safely towed in;[20] and testimony of the expert Holm of instances of sampans awash being towed to safety[21] (Appellee's Brief, p. 12).

It is submitted that, in the light of the entire record, this does not amount to the substantial evidence required by this Court to support a trial Court's conclusions in order that such conclusions be given strong effect here.

As has been previously pointed out, the appellee's approach that it is necessary for the appellant to show that the trial Court's findings were "clearly erroneous" to warrant a reversal is not a correct statement of the principles guiding this Court in the review of this case.

The appellee having thus endeavored to establish the factual support of the findings of the trial Court

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[18]Both, however, testified of instances where sampans had flooded, filled and had become completely submerged although subsequently salvaged (R. 201, 328-331).

[19]Although on cross-examination he admitted that he was familiar with one case where the vessel completely submerged (R. 201).

[20]The tow being in the lee of the Island of Oahu and not through unprotected water such as that found in Molokai Channel (R. 169).

[21]In one instance the witness did not know from whence it was towed or the nature of the accident causing the damage. In the second, the vessel was brought a very short distance to the shipyard, the passage being entirely within enclosed waters inside the reef; and in the third, the towage was successfully accomplished after the engine had been removed from the craft and she had otherwise been made ready for tow (R. 328-329).

proceeds to contend that the findings support a determination that the master of the tug was negligent (Appellee's Brief, pp. 14-21). An analysis of the appellee's brief as well as the record itself shows a lack of any evidence concerning the standard of skill, experience, or care that is or should be required of a tug master of a small tug in Hawaiin waters (except as hereinafter mentioned) or of the failure of compliance by the master of the tug "Kolo" with such standards. The evidence shows the knowledge of experts and the opinion of experts but does not show that a tug master is held to the standards of such knowledge or opinions.

The only evidence touching upon the skill or care to be expected of a tug captain of a class of that of the "Kolo" is contained in the statement of Captain Holm that "a small tug requires a small master, perhaps, and he couldn't expect to have a salvage expert at the wheel of a 60, 70 foot tug * * *" "In commercial towing, why sometimes very hard to get experts at the price involved in towing sampans and other things" (R. 333).

It is submitted that the appellee seeks to impose upon the master of the tug "Kolo" the knowledge, skill and experience of technical experts in the field of salvage work. He seeks to demand that the tug master act "in the exercise of the reasonable discretion of experienced navigators" with knowledge of "such information as is current in the calling". There is no testimony of any other tug masters on the point. There is the testimony only of experts who do not oth-

erwise touch upon the knowledge or skill current among Hawaiian tug masters of small vessels.

Now because experts testified that the vessel might have been salvaged, although the possibility or probability of its sinking before reaching port is not excluded, it does not follow that the tug should be responsible because the tow was not safely brought into port. To so conclude would make the tug an insurer of the safety of the towed vessel, something not required as a matter of general towage law.

In addition the appellee would have this Court disregard the principle of *The Stirling Tomkins* and the *S. S. Bellatrix* cases, as well as the holding of this Court itself in *Allen & Robinson v. Inter-Island Steam Nav. Co.,* 34 F. (2d) 83, 86, that a tug master is not liable for mere errors of judgment in an emergency on the ground that there was not involved in the present instance an emergency situation (Appellee's Brief, pp. 14, 15). With the lives of the crewmen at stake because of the submergence of their towed vessel it is hard to see the merit of the appellee's contention. The testimony that these men were clinging to the submerged portion of the cabin, the whole of which was under water, as well as the entire vessel aft of the cabin, with merely the tip of the bow projecting out of the water at a 45 degree angle, would apparently justify a conclusion that the situation was an emergency one. But if the term "emergency" is objectionable it should be observed that the principle of these cases has been applied in "difficult situations" in *The*

Stirling Tomkins case at a "critical time" in the *Allen & Robinson* case. Clearly the principle is applicable to this case.

The appellee further urges that inaction on the part of the tug master at the time of the submergence of the tow would have resulted in no damage (Appellee's Brief, p. 16). Yet the testimony dealing with the then condition of the tow leads to the inevitable conclusion that action was required, and required quickly, in order that the lives of the crewmen on the towed vessel might be saved.

The appellee further cites as a principle of law that a "high degree of diligence to save a tow that has gone adrift" reposes on a tug (Appellee's Brief, p. 17). This statement constitutes not the decision but *dicta* in the case cited therefor[22]. In none of the cases which the appellee cites in furtherance of this principle was the tow apparently foundering. In one case of those cited the tug captain thought the tows were going down[23] but this view was apparently not shared by the crew members of the tow who did not signal to be taken off, as in the present case (R. 143), but left only after the tug captain had decided to abandon and had actually cut the tow line. The other cases all involved the abandonment of apparently sound and seaworthy tows because of the difficulties experienced in attempting to continue the tow under heavy weather. The lack of emergency in the cases submitted, weakens the ap-

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[22]*Atkinson v. Scully*, 246 Fed. 463 (1917).
[23]*Appeal of Cahill*, 124 Fed. 63.

plication of any principle such as that enunciated by the appellee to the case at bar.

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3. **A TUG AND HER MASTER ARE NOT SOLELY RESPONSIBLE FOR THE LOSS OF AN UNSEAWORTHY TOW, KNOWN TO BE SUCH BY HER OWNER AT THE TIME THE TOW IS UNDERTAKEN, AND WHERE THE TOW IS INADEQUATELY EQUIPPED FOR THE VOYAGE AND WHERE HER CAPTAIN FAILED TO NOTIFY THE TUG THAT SHE WAS TAKING WATER IN EXCESS OF THE CAPACITY OF HER PUMPS UNTIL A BREAKDOWN OF THE PUMPS OCCURRED, AND WHERE HER CAPTAIN AFTER LEAVING THE VESSEL TOOK NO AFFIRMATIVE STEPS THEREAFTER TO SAVE HER.**

It is apparently the position of the appellee that the tow had no obligation or responsibility with respect to notification of the tug that its pump was not keeping up with the water coming into the hull, and that it further had no obligation to be initially furnished with adequate pumping equipment. This is contrary to the principle of the cases cited in the appellant's brief, pages 36-40.

No authority is cited by the appellee for his position other than the case of *The Stirling Tomkins*,[24] a case involving a tug with a string of eight barges which failed to notify the barges of a curve in the river, as a result of which, in making a change of course, the barges were whipped into shallow water and were damaged. This case holding that the tug had the responsibility of setting up an adequate sig-

[24] 56 F. (2d) 740.

naling system to warn the tows of such conditions is hardly authority for the proposition that the appellee urges. It certainly does not refute or gainsay the principle of the cases relied upon by the appellant.

The fact is that the pumping facilities on the tow were inadequate. The pump was not properly protected from the water. The crew men of the tow had the duty of notifying the tug that water was being shipped aboard faster than the pump could handle it. The members of the crew of the tow failed to notify the tug of this condition until the situation became serious, the pump became inoperative, and the vessels were approximately mid-way in the channel between the islands.

It is submitted that this negligence clearly contributed to the loss of the ship, and along with the other factors set out in the brief of the appellant, would require a halving of the damages if the tug should be found to be at all at fault in connection with the loss of the tow.

CONCLUSION.

For the reasons set forth in the appellant's opening brief as well as those herein contained it is respectfully submitted:

1. That a libel *in rem* may not be maintained against the tug "Kolo" on the facts as they appear in the record of this case;

2. That the record herein shows that the loss of the sampan "Tenyo Maru" was not due to the fault of the tug "Kolo";

3. That the loss of the "Tenyo Maru" is attributable to her unseaworthy condition, inadequate equipment and failure of those aboard her to take adequate affirmative steps to notify the tug "Kolo" of her condition until she was *in extremis,* and that, if any fault is attributable to the tug "Kolo" in connection with the loss of the "Tenyo Maru", damages should be halved between the two vessels.

Dated, Honolulu, T. H., this 1st day of March, 1950.

SMITH, WILD, BEEBE & CADES,
By J. EDWARD COLLINS,
Proctors for Appellant.